

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

JAMES KLUPPELBERG,	)	
Plaintiff,	)	Docket No. 13 C 3963
vs.	)	
JON BURGE, et al.,	)	Chicago, Illinois
Defendants.	)	September 21, 2016
	)	10:05 a.m.

TRANSCRIPT OF PROCEEDINGS - Status  
BEFORE THE HONORABLE JOAN H. LEFKOW

APPEARANCES:

For the Plaintiff: LOEVY & LOEVY  
BY: MS. ELIZABETH N. MAZUR  
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For the Defendants: THE SOTOS LAW FIRM, P.C.  
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1 THE CLERK: 13 C 3963, Kluppelberg v. Burge.

2 MS. EKL: Good morning, your Honor.

3 Elizabeth Ekl, E-k-l, on behalf of the individual  
4 Chicago police and fire defendants.

5 MR. SKARIN: Good morning, your Honor.

6 Kenton Skarin, S-k-a-r-i-n, on behalf of Defendant  
7 City of Chicago.

8 MS. MAZUR: Good morning, your Honor.

9 Elizabeth Mazur and Sarah Grusin for plaintiff.

10 THE COURT: Good morning.

11 Ms. Ekl, you are here for whom?

12 MS. EKL: Your Honor, all of the individual  
13 defendants in the case.

14 THE COURT: Okay.

15 So I really don't have time to hear much argument  
16 on this. I looked at the response in the motion. I have a  
17 couple of questions.

18 One is, it seems to me disingenuous to the  
19 plaintiff to say this is new -- disingenuous of the plaintiff  
20 to say this is new when you have had this file for 14 months,  
21 and you didn't tell me in your motion that you had redeposed  
22 four of the people after receiving the file.

23 MS. MAZUR: That's correct, your Honor. And I  
24 apologize if it came off that way.

25 As I understand it, during fact discovery of this

1 case, when we redeposed defendants about the file, it is  
2 because we wanted information about the file. So we  
3 deposed -- redeposed the defendants who were testifying.

4 Defendant Burge has been on the Fifth Amendment.  
5 It was our understanding he would be taking the Fifth  
6 Amendment on everything, so we didn't ask to redepose him  
7 about that at the time.

8 What, I guess, is actually new is that we have  
9 learned that he is not coming to trial, and so his testimony  
10 will be limited to what is in his deposition. And we didn't  
11 have the opportunity to pose questions about him -- about the  
12 file at his deposition. We sort of anticipated we would just  
13 pose those questions to him at trial when he appeared, but he  
14 is not appearing.

15 So this is really just a chance to get the record  
16 on asking those questions. And I understand defendants are  
17 concerned. They think it's prejudicial. But it seems like  
18 those are really admissibility questions, and that can be  
19 dealt with separately. While we are out there asking him  
20 questions about other things, can we ask these few extra  
21 questions and get the record on it?

22 MS. EKL: Your Honor, in regard to Mr. Burge's  
23 unavailability, he was incarcerated in Butner, as you well  
24 know, at the time that we took his deposition, and we had no  
25 indication that he was going to be released and that we would

1 have a trial after his release.

2 He is still technically incarcerated, in the sense  
3 that he is under supervision at this point in time.

4 We have some additional issues regarding his health  
5 that would also additionally prevent him from coming.

6 But when we took his deposition in Butner, at that  
7 point in time, I don't believe it was anyone's understanding  
8 he was going to be free to come into court and testify.

9 THE COURT: Well, is it a mutual understanding that  
10 there will be a continued deposition about his financial  
11 situation, or are you objecting to that as well?

12 MS. EKL: Your Honor, I have not confirmed yet with  
13 Mr. Burge that we will be asserting an inability to pay  
14 defense in relation to punitive damages. I believe we will.  
15 And if that's the case, then we would be presenting him for a  
16 very limited deposition for that purpose. But he has not  
17 confirmed yet that that's what he would like to do.

18 THE COURT: Well, I think that would be important  
19 to know. So why don't you figure that out.

20 MS. EKL: I anticipate it's more likely than not  
21 that he will do that, your Honor.

22 THE COURT: So if there is going to be further  
23 inquiry and you are going down to Florida to -- I mean, there  
24 is no good reason to prevent him from -- or to prevent the  
25 plaintiff from asking, as she says, a few additional

1 questions. We will see.

2 MS. EKL: Your Honor -- go ahead.

3 MR. SKARIN: Your Honor, I would just say, from the  
4 City's perspective, I think there is extreme prejudice, as we  
5 have pointed out.

6 And just to clarify one point, it's not that they  
7 have had this file for 14 months. They have had this file  
8 for 25 months at this point. They redeposed three people,  
9 and they tried to do a fourth. He died, unfortunately.

10 Fifteen months ago, when fact discovery closed, we  
11 have been preparing this case based on the decision that  
12 plaintiff made in discovery, and so there is the -- there is  
13 more than the, can you just do it? Of course, you could  
14 always have another deposition.

15 The problem is that the case -- what's really going  
16 on here is that they don't like the case they have, because  
17 they want to go and ask a series of "Did you shoot Kennedy?"  
18 questions that they know that they will get a Fifth Amendment  
19 inference to, and then use that to -- six weeks before trial;  
20 and probably by the time Burge is redeposed, two weeks, three  
21 weeks before trial -- rebuild their whole case that they  
22 didn't do in the almost three years that this case has been  
23 in fact discovery.

24 That's inherently prejudicial, and that's the  
25 reason for our -- for the objection, from the City's

1 perspective.

2 MS. EKL: Your Honor, the individuals agree  
3 completely. We believe that this deposition of Mr. Burge is  
4 going to be used to bridge a gap in evidence that they know  
5 is lacking, and that because of Mr. Burge's assertion of the  
6 Fifth, as Mr. Skarin pointed out, they are going to use it to  
7 ask him questions and to get an adverse inference where they  
8 can't otherwise provide evidence to support their claim.

9 MS. MAZUR: Again, Judge, that point was made in  
10 their briefs. And as I mentioned, that's really a question  
11 about admissibility, if it's going to be used at trial in  
12 this case.

13 What we are asking for right now is just, while we  
14 are out there, which it seems like we are going to be, can we  
15 ask these few questions? We all know what the answers are  
16 going to be. That way we would have the record available  
17 should your Honor decide that we are allowed to use it at  
18 trial. Otherwise we would have no way of having that record  
19 available.

20 THE COURT: So I am going to get a motion to bar  
21 instead.

22 MS. EKL: Right. And, your Honor, we know what the  
23 answer is going to be. I can tell you right now, Mr. Burge's  
24 answer to any question about his employment is going to be,  
25 "I assert my Fifth Amendment right." So any question that

1       they intend to ask him, that will be the answer.

2               MR. SKARIN: And they have known that will be the  
3       answer since they took his deposition -- I can't remember --  
4       something like two years ago. And if they wanted that, they  
5       could have asked for it 15 months ago. They didn't, and  
6       that's the cause for the prejudice.

7               It's not fair. We are getting sandbagged.

8               THE COURT: Well, I suppose that's true.

9               Do you have one final thing to say? It's your  
10       motion.

11              MS. MAZUR: I guess, you know, Judge, we -- I don't  
12       really understand the sandbagging argument. I mean, if he  
13       was coming to testify live, we could just ask him these  
14       questions.

15              We may have a motion to bar in advance of trial.  
16       But really, I mean, it seems like Mr. Skarin's point is that  
17       we should have asked for three depositions of Mr. Burge  
18       instead of two. It just doesn't seem that there is any  
19       prejudice in just getting a record that we may or may not be  
20       able to use at court -- at trial.

21              THE COURT: Well, I know that I am just inviting  
22       another motion, but I will grant the motion on the condition  
23       that you are going to take a deposition as to his finances,  
24       and then we will deal with it later.

25              I guess it's a question of whether his -- you know,

1 there is -- the statute of limitations has long since run,  
2 but I guess he could be prosecuted again for perjury if he  
3 answers, right?

4 MS. EKL: Your Honor, the other concern is -- and  
5 we raised this in relation to the other depositions. We  
6 didn't oppose them asking questions in a redeposition of  
7 certain other defendants who arguably could have had some  
8 contact with this file, but Judge Valdez, at the time of that  
9 particular motion, agreed to limit the questions that could  
10 be asked. So again, they didn't go beyond asking  
11 specifically about this new file.

12 So I know that it's been represented they only have  
13 a few questions to ask. We would just ask that there be some  
14 sort of order defining what that means, I suppose.

15 MR. SKARIN: And if I could suggest as one  
16 possibility -- Judge Valdez limited them to three hours in  
17 the redepositions of the other defendants. At a minimum,  
18 that, combined with a limit on questions related to the file  
19 at issue itself, would probably be at least a reasonable  
20 notion.

21 MS. EKL: I think that would be more than enough  
22 time to ask Mr. Burge two questions about whether or not he  
23 had any contact with this file or was even employed in the  
24 location where the file allegedly was in existence. If they  
25 can't -- I mean --



1 THE COURT: All right. So yes, a limit. Any  
2 deposition will not exceed, what -- three hours should be  
3 plenty of time for all matters.

4 And as to the scope of what you are talking about,  
5 can you define it?

6 MS. MAZUR: Can we just agree that whatever the  
7 limit was that -- I mean, I think we could work that out. We  
8 do not anticipate on going into new territory or taking a  
9 very long dep.

10 MS. EKL: My concern, quite honestly, on behalf of  
11 Mr. Burge, is that I think three hours to ask about the new  
12 file is extraordinarily excessive, given that --

13 THE COURT: I don't mean three hours about the new  
14 file. Shall we say, what, 30 minutes? I mean. It depends  
15 on how it goes. One hour. Okay?

16 MS. MAZUR: Fair enough.

17 THE COURT: All right.

18 MS. MAZUR: I think we had -- we don't want to hold  
19 you, Judge, but there is a few little housekeeping things.

20 One is, there is a motion up on the page limit on  
21 defendants' motion to bar.

22 THE COURT: I think I granted that.

23 MS. MAZUR: And then, we are in the middle -- we  
24 are exchanging pretrial order materials. We had some  
25 question about whether your Honor, first of all, would like

1 trial briefs; and if so, if we should be exchanging them  
2 beforehand or if each side just files their own when we  
3 submit the final pretrial order?

4 THE COURT: I don't -- we didn't have a motion for  
5 summary judgment in this case. So no, you don't have to  
6 exchange them beforehand, but give me -- I think I know what  
7 the law is, but you probably have it on your word processors.  
8 I think it comes out in the jury instructions, so don't  
9 bother with a trial brief.

10 MS. MAZUR: Okay.

11 MR. SKARIN: No trial brief?

12 THE COURT: No trial brief.

13 MR. SKARIN: Thank you, your Honor.

14 MS. MAZUR: Thank you.

15 MS. EKL: Thank you very much.

16 \* \* \* \* \*

17 I certify that the foregoing is a correct transcript from the  
18 record of proceedings in the above-entitled matter.

19 /s/ Frances Ward October 26, 2016.  
20 Official Court Reporter  
21 F/j  
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